

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DENNIS BANKS,

Petitioner,

v.

Case Number 10-14953
Honorable David M. Lawson

STEVE RIVARD,

Respondent.

_____/

ORDER DENYING CERTIFICATE OF APPEALABILITY

Petitioner Dennis Banks, presently in the custody of the Michigan Department of Corrections, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his conviction of armed robbery, Mich. Comp. Laws § 750.529. A Saginaw County, Michigan jury found the petitioner guilty of that crime, and a circuit court judge sentenced him as a fourth habitual offender to a prison term of 15 to 23 years. The petitioner's sole issue in his habeas petition was that the evidence is insufficient to convict him because the State failed to prove that he was armed with a dangerous weapon at the time he stole goods from a department store. The Court found that the petitioner was not entitled to relief.

Pursuant to Rule 11 of the Rules Governing Section 2254 Proceedings, which was amended as of December 1, 2009:

The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

Rule 11, Rules Governing Section 2254 Proceedings.

A certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Courts must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997). To receive a certificate of appealability, “a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotes and citations omitted).

Under Michigan law, the question of whether a normally harmless object constitutes a dangerous weapon turns on the manner in which it was used, and that determination is squarely within the jury’s province. The jury was presented with evidence that the petitioner possessed a bag containing five bottles of cologne, which he swung at Brandon McGraw, striking him in the head while attempting to flee the scene. McGraw said he believed the bag of cologne was a dangerous weapon. That testimony was sufficient to establish beyond a reasonable doubt that the petitioner was armed with a dangerous weapon during the commission of the robbery. The Court now concludes that the petitioner has failed to make a substantial showing that he was denied his constitutional rights and that reasonable jurists could not debate the correctness of the Court’s decision. Therefore, the Court will deny a certificate of appealability on this issue.

Accordingly, it is **ORDERED** that a certificate of appealability is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 28, 2010

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 28, 2010.

s/Deborah R. Tofil
DEBORAH R. TOFIL